Supreme Court, U.S.
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NO. 95-1757

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 66,
Petitioner,

v.

HOUSTON LIGHTING & POWER COMPANY, A SUBSIDIARY OF HOUSTON INDUSTRIES INCORPORATED, AS SUCCESSOR IN INTEREST TO UTILITY FUELS, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Fifth Circuit correctly held that an arbitration award did not draw its essence from the collective bargaining agreement when the arbitrator decided an issue excepted from his jurisdiction and when he drew on extra-contractual sources to support his authority to re-evaluate the qualifications of the grievant.

PARTIES TO THE PROCEEDINGS

Petitioner:

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 66

Respondent:

HOUSTON LIGHTING & POWER COMPANY, A SUBSIDIARY OF HOUSTON INDUSTRIES INCORPORATED, AS SUCCESSOR IN INTEREST TO UTILITY FUELS, INC.

RULE 29.6 LIST

Entities Affiliated With Respondent:

DEVELOPMENT VENTURES, INC.; HL&P ENERGY SERVICES CO.; HOUSTON INDUSTRIES INCORPORATED; HOUSTON INDUSTRIES FINANCE, INC.; HOUSTON INDUSTRIES ENERGY, INC.; AND UTILITY FUELS, INC.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 71 F.3d 179 (5th Cir. 1995). The opinion of the district court is unreported, as is the arbitration award at issue. The three opinions appear as Appendices 1-3 to Petitioner's Petition for Certiorari.

JURISDICTION

The district court had jurisdiction of this case pursuant to 28 U.S.C. § 1331 in that this action arose under the laws of the United States, specifically the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185 (1988), as a suit to set aside an arbitration award. The court of appeals had jurisdiction to review the district court's final judgment under 28 U.S.C. § 1291. Petitioner attempts to invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED IN THIS CASE

This case implicates § 301 of the LMRA, 29 U.S.C. § 185, because it is an action by an employer to set aside an arbitration award issued pursuant to the grievance-and-arbitration machinery of a collective bargaining agreement ("CBA") between Petitioner and Respondent.

STATEMENT OF THE CASE

A. *Course of Proceedings and Disposition in the Courts Below.*

Petitioner International Brotherhood of Electrical Workers, Local Union No. 66 ("Union") correctly notes in its Petition that this case arose from a grievance relating to the termination of Sam Thornal ("Thornal"), an employee of Respondent Houston Lighting & Power

Company's ("Company") predecessor, Utility Fuels, Inc., as part of a reduction-in-force ("RIF") in 1992. Moreover, the Union accurately observes that Thornal's grievance proceeded to arbitration before Arbitrator Otis H. King, who ultimately sustained the grievance and ordered the Company to reinstate the Grievant.

However, the Union's Petition neglects to mention that the parties did not agree on the scope of the submission of issues to be arbitrated. The Union contended that the issue for resolution was whether the entire 1992 RIF, as well as Thornal's individual layoff, violated the collective bargaining agreement ("CBA") between the Company and the Union. (*See* Union's Pet., App. 3, at 2.) By contrast, the Company averred that the only issue presented for the arbitrator was whether the Company "unreasonably and unjustly discriminated against [the] Grievant . . . ." (*Id.*) In sustaining the grievance, the arbitrator neither discussed nor apparently considered the Company's version of the issue, focusing instead only on the version proffered by the Union. Importantly, the arbitrator ruled in favor of Thornal even though he explicitly found that the RIF process as a whole was permissible under the CBA and was facially fair.

The district court agreed with the Union's argument that Arbitrator King's award drew its essence from the CBA. On appeal, however, the Fifth Circuit carefully considered the scope of submission and arbitrability issues that the district court apparently ignored, and it held that the arbitrator exceeded the scope of his authority by re-evaluating Thornal's qualifications and re-ranking him for RIF purposes since this was a right reserved exclusively to the Company under the CBA. The Fifth Circuit alternatively observed that the award violated the "essence" test since the arbitrator invoked the terms of an entirely different CBA to

justify his reassessment of Thornal's abilities, skills, and qualifications.

B. *Statement of Facts.*

Respondent incorporates by reference the factual background set forth in the Fifth Circuit's majority opinion, 71 F.3d at 180-81.

REASONS WHY PETITION SHOULD BE DENIED

A. The Fifth Circuit's Decision Adheres to the Requirements of the *Steelworkers Trilogy*.

1. *The Fifth Circuit Expressly Recognized and Correctly Applied the Principle of Limited Judicial Review of Arbitration Awards.*

In attempting to obtain review by the Court, the Union relies almost exclusively on the contention that the Fifth Circuit's decision conflicts with the Supreme Court's holdings in the *Steelworkers Trilogy*.[1] (Union's Pet. at 16.) This argument wholly lacks merit because the Fifth Circuit acted fully in accordance with the letter and spirit of the *Trilogy*.

In outlining the basis for its decision, the Fifth Circuit first noted that judicial review of arbitration awards is limited. *Houston Lighting & Power Co.*, 71 F.3d at 182; *see also Enterprise Wheel*, 363 U.S. at 597. The Fifth

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[1] The *Steelworkers Trilogy* consists of *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564 (1960).

Circuit then observed that a court cannot second-guess an arbitrator's factual determinations or his interpretation of a CBA as it relates to the merits of a grievance as long as the award "draws its essence from the collective bargaining agreement." 71 F.3d at 182; *see also Enterprise Wheel*, 363 U.S. at 597 (same). Consequently, pursuant to this Court's pronouncements, the Fifth Circuit exercised its power to enforce the jurisdictional limits imposed on the arbitrator by the CBA, i.e., it proceeded to determine "whether the arbitrator exceeded his authority under the Agreement when he re-evaluated Thornal's qualifications and re-calculated his performance rating." 71 F.3d at 182. In a straightforward construction of the CBA, the Fifth Circuit held that "[t]he Company has the exclusive right to make the employee qualification determinations" under Art. IV, § 7 of this particular CBA, without "confer[ring] upon the arbitrator the right to make a *de novo* determination of the employee's qualifications." *Id.* at 184. Although the Union argues that this action amounted to an improper "indulg[ence] in a comparative analysis between multiple contractual provisions,"[2] in actuality the Fifth Circuit displayed scrupulous faithfulness to this Court's labor law jurisprudence.

2. *Deciding the Arbitrability of the Grievance Required the Court to Examine the CBA's Limitations on Arbitral Authority.*

The authority for the Fifth Circuit to consider the scope of the arbitrator's jurisdiction under the CBA derives directly from this Court's instruction "to refuse enforcement of the award" when an "arbitrator's words manifest an infidelity" to the limitations imposed by the CBA. *Enterprise Wheel*, 363 U.S. at 597. The *Trilogy*'s

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[2] Union's Pet. at 23.

explicit reservation of authority concerning the finality to be afforded arbitration awards stems largely from the notion that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit." *Warrior & Gulf*, 363 U.S. at 582.[3] Thus, the judicial inquiry focuses on "whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator the power to make the award he made." *Id.* *See also American Mfg. Co.*, 363 U.S. at 564 (describing the judiciary's role as "ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract").

Significantly, the principle of refusing to bind a party to an award that exceeds the scope of the submission has not eroded over time, as evidenced by its reaffirmation in *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648 (1986).[4] In *Communications Workers*, the Court considered whether the layoff provision of a labor contract presented an arbitrable dispute. 475 U.S.

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[3] As commentators have observed, "[n]otwithstanding this paean to arbitral competence, the *Enterprise* Court made clear that the arbitrator's judgment is not absolutely unreversible . . . . The Court wished to spare arbitrating parties from an award which altogether deviated from the collective bargaining agreement, and therefore preserved a limited scope of judicial review as a safety valve." Michael H. LeRoy & Peter Feuille, *The Steelworkers Trilogy and Grievance Arbitration Appeals: How the Federal Courts Respond*, 13 Indus. Rel. L.J. 78, 96 (1991) (citing *Enterprise Wheel*, 363 U.S. at 597).

[4] *See also First Options of Chicago, Inc. v. Kaplan*, 115 S.Ct. 1920, 1924 (1995) ("[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes -- but only those disputes -- that the parties have agreed to submit to arbitration."); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 744 (1981) ("An arbitrator's power is both derived from, and limited by, the collective-bargaining agreement.").

at 652. In reversing the court of appeals, the Court held that "[t]his issue should have been decided by the District Court and reviewed by the Court of Appeals; it should not have been referred to the arbitrator." *Id.* Likewise, in the present case the Company never agreed to submit the issue of Thornal's abilities, skills, and qualifications for review by the arbitrator; that determination was reserved to the Company by art. IV, § 7 of the CBA. 71 F.3d at 182 ("The Company shall determine ability, skill and qualifications. . . ."). As a result, it was the Fifth Circuit's duty to review the labor contract and decide whether the qualifications issue was one on which the arbitrator had jurisdiction to pass. Having determined that the power to re-evaluate Thornal was beyond the arbitrator's purview, the Court of Appeals had no choice but "to refuse enforcement of the award." *Enterprise Wheel*, 363 U.S. at 597. Thus, judicial scrutiny of arbitration awards to determine whether the arbitrator exceeded the scope of his contractual authority constitutes an integral part of the teachings of the *Steelworkers Trilogy*, and the Fifth Circuit's unremarkable application of this rule does not warrant a place on this Court's docket.

3. *Leaving Arbitrability Questions to the Courts Fosters, Rather than Discourages, Industrial Peace.*

In conducting an analysis under the "essence" test, the Fifth Circuit also followed "[t]he second rule [from the *Trilogy*, which] . . . is that the question of arbitrability - whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance--is undeniably an issue for judicial determination." *Communications Workers*, 475 U.S. at 649. *See also Warrior & Gulf*, 363 U.S. at 583 n.7 ("[T]he question of arbitrability is for the courts to decide."). The soundness of this rule is now beyond peradventure. Indeed, if courts were not free to

assess the arbitrability issue, the parties to a CBA would be less likely to agree to arbitrate at all, frustrating the national policy favoring the grievance-and-arbitration machinery in order to achieve industrial peace.[5] As this Court has stated, "[t]he willingness of parties to enter into agreements that provide for arbitration of specified disputes would be 'drastically reduced,' however, if a labor arbitrator had the 'power to determine his own jurisdiction.'" *Communications Workers*, 475 at 651 (quoting Archibald Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1509 (1959)). Consequently, "the conventional arbitration clause limiting the arbitrator to disputes concerning 'interpretation and application' of the contract reserves the right to a judicial determination upon whether the arbitrator has jurisdiction over the subject matter . . . ." Cox, 72 Harv. L. Rev. at 1511.

The Union apparently favors a contrary rule under which the only check on an arbitrator's potential abuse of power is a review in which a court "limit[s] itself" to a consideration of only one clause of the CBA, i.e., art. II, § 4 concerning an arbitrator's function, without regard to other proscriptions on arbitral authority in the labor contract. (Union's Pet. at 24.) Specifically, the Union asks whether a court should engage in "extensive analysis of the collective bargaining agreement, including the contractual provisions involved in the underlying arbitration award," or whether a court should merely ask whether the award "draws its essence" from the CBA. (Union's Pet. at i.) The decisions of this Court demonstrate that the Union's proposed inquiry misses the mark on both counts. Courts must analyze the

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[5] *See* 29 U.S.C. § 173(d) (1988); *Gateway Coal Co. v. United Mine Workers of Am.*, 414 U.S. 368, 377 (1974) ("The federal policy favoring arbitration of labor disputes is firmly grounded in congressional command.").

provisions of a CBA, even those apparently dealing with the disputed issue, in order to determine whether the issue presented is one that the parties agreed to resolve through arbitration. *See Communications Workers*, 475 U.S. at 651 ("It is the court's duty to interpret the agreement and to determine whether the parties intended to arbitrate grievances concerning layoffs . . . ."); *see also First Options*, 115 S. Ct. at 1923 ("[A] party who has not agreed to arbitrate will normally have a right to a Court's decision about the merits of its dispute," such as a party's "obligations under a contract."). Thus, contrary to the Union's suggestion, "the reviewing court must examine the pertinent contract language as well as relevant negotiating history and other collateral evidence. In other words, the court needs to look carefully at the same kind of evidence that otherwise would be reviewed in arbitration." LeRoy & Feuille, 13 Indus. Rel. L.J. at 95.[6]

Pursuant to this understanding, since the *Steelworkers Trilogy*, this Court has construed the terms of collective bargaining agreements in order to determine whether particular disputes were within the scope of an arbitrator's authority. For example, in *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29 (1987), the Court rejected the company's argument that the award should

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[6] *See also* Theodore J. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 Mich. L. Rev. 1137, 1148 (1977) ("in insisting that an enforceable award must 'draw its essence from the collective bargaining agreement' . . . the court plainly appeared to authorize *some* substantive evaluation."); Cox, 72 Harv. L. Rev. at 1509-10 (stating that, in order to give effect to the underlying purpose of an arbitration cause, the law excepts interpretation of the arbitration clause "from the general power to interpret, thus giving the court the duty to determine whether the claim which one side wishes to arbitrate gives rise to a dispute concerning the 'interpretation and application' of the collective bargaining agreement").

be vacated because of erroneous factual findings by the arbitrator. Nevertheless, when discussing the company's argument that the contract, by specifically listing the charged offense as a cause for discharge, precluded the arbitrator from mitigating the company's chosen penalty, the Court noted that "[t]he parties, of course, may limit the discretion of the arbitrator in this respect; and it may be, as the Company argues, that under the contract involved here, it was within the unreviewable discretion of management to discharge an employee once a violation of Rule 11.1 was found." 484 U.S. at 41.[7] The Court's statement evinces a willingness to vacate arbitration awards that encroach upon matters removed from the arbitrator's control by the collective bargaining agreement.[8] In sum, "[a]n arbitral award is also subject to judicial vacation for want of authority if it reaches beyond the boundaries of the 'submission,' the statement of the issue as agreed upon by the parties." St. Antoine, 75 Mich. L. Rev. at 1151.

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[7] In *Misco*, the Court refused to consider the company's arguments regarding the scope of the arbitrator's authority because "the parties stipulated that the issue before the arbitrator was whether there was 'just' cause for the discharge." 484 U.S. at 41. By contrast, in the instant case the Company refused to stipulate to the Union's broad submission at the arbitration. Instead, the Company attempted to confine the arbitrator to the parameters of the CBA by defining the issue as follows: "Did the Company unreasonably and unjustly discriminate against the grievant by terminating him while retaining less senior heavy equipment operators?" (Union's Pet., App. 3, at 2.)

[8] Similarly, a number of decisions of this Court have expressly relied on the *Steelworkers Trilogy* to support review of collective bargaining agreement terms in determining arbitrability. *See, e.g., Communications Workers*, 475 U.S. at 648-49; *International Union of Operating Eng'rs, Local 150 v. Flair Builders, Inc.*, 406 U.S. 487, 491 (1972); *John Wiley & Sons v. Livingston*, 376 U.S. 543, 546-47 (1964).

In the case at bar, the constraint on Arbitrator King's power to reassess Thornal's capabilities plainly appears in art. IV, § 7 of the CBA, mandating vacatur of the award, which sought to circumvent this contractual limitation under the guise of the arbitrator's "own brand of industrial justice." *Enterprise Wheel*, 363 U.S. at 597. Thus, the Union's assertion that the Fifth Circuit's opinion in this case represents a departure from the *Steelworkers Trilogy* is without merit because, "whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Courts, on the basis of the contract entered into by the parties." *John Wiley & Sons*, 376 U.S. at 546-47.

B. There is No Conflict Among the Circuit Courts of Appeals.

The decisions from other courts of appeals also support the Fifth Circuit's application of the *Steelworkers Trilogy* in the instant case. The various circuit courts have consistently construed the *Steelworkers Trilogy's* limitation on the power of the courts to review the merits of arbitration awards as "an admonition concerning the merits of the controversy rather than any jurisdictional prerequisites imposed by the arbitration agreement." *Container Prods., Inc. v. United Steelworkers of Am.*, 873 F.2d 818, 820 (5th Cir. 1989). Thus, "vacation or modification of an arbitration award is clearly proper where the arbitrator has exceeded his authority." *Id.*[9] Although the Union argues that the Fifth

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[9] *See also Polk Bros. v. Chicago Truck Drivers Union*, 973 F.2d 593, 597-98 (7th Cir. 1992) (holding that arbitration decision did not draw its essence from the terms of the agreement where the arbitrator "went well beyond his authority under the agreement"); *Harry Hoffman Printing, Inc. v. Graphic Communications Int'l Union, Local 261*, 950 F.2d 95, 98 (2d Cir. 1991) (vacating an arbitration award where the arbitrators "did

Circuit decision directly conflicts with the *Trilogy*, it has failed to cite any contrary authority. Instead, a review of the authorities reveals that the Fifth Circuit's analysis comports with the overwhelming weight of authority in holding that the *Trilogy* allows—indeed requires—courts to enforce the contractual limitations on arbitral authority.

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not merely misapply principles of contractual interpretation or misinterpret the CBA, but drew upon a concept upon which [they were] not entitled to rely"); *Delta Queen Steamboat Co. v. District 2 Marine Eng'rs Beneficial Ass'n*, 889 F.2d 599, 602 (5th Cir. 1989) (stating that "[f]ederal courts are free to scrutinize the award to ensure that the arbitrator acted in conformity with the jurisdictional prerequisites of the collective bargaining agreement. Where an arbitrator exceeds his contractual authority, vacation or modification of the award is an appropriate remedy") (citations omitted), *cert. denied*, 498 U.S. 853 (1990); *Georgia Pacific Corp. v. Local 27 United Paperworkers Int'l Union*, 864 F.2d 940, 945-46 (1st Cir. 1988) (vacating award where arbitrator substituted his "normal authority" for explicit terms of the CBA); *Bruno's, Inc. v. United Food & Commercial Workers Int'l Union, Local 1657*, 858 F.2d 1529, 1532 (11th Cir. 1988) (vacating arbitration award that imposed a new work rule where the CBA vested in the employer the right to establish and maintain reasonable rules of operation); *Trailways Lines, Inc. v. Trailways, Inc. Joint Council*, 807 F.2d 1416 (8th Cir. 1986); *Frederick Meiswinkel Inc. v. Laborers Union Local 261*, 744 F.2d 1374, 1377 (9th Cir. 1984) (stating that "an arbitrator may decide only those issues submitted to arbitration, and [ ] courts will refuse to enforce an award when the arbitrator exceeds its power") (citations omitted), *cert. denied*, 470 U.S. 1028 (1985); *Local 342, United Auto. Workers v. T.R.W., Inc.*, 402 F.2d 727, 730 (6th Cir. 1968) (holding that, where the CBA gave the company the right to discharge some or all employees who engaged in an illegal strike, "it was not for an arbitrator to add to the contract a provision" requiring the company to announce supportable reasons for its selections), *cert. denied*, 395 U.S. 910 (1969).

C. The Fifth Circuit's Conclusion That the Arbitrator Exceeded His Authority was Correct.

In this case, art. IV, § 7 of the CBA states that,

> In the event of promotions, layoffs, or a permanent reduction in the working force at a facility, where ability, skill and qualifications are equal, length of service at the facility shall govern. . . .*The Company shall determine ability, skill and qualifications* subject to an employee's right to assert a grievance under Article II . . . .

71 F.3d at 182. The CBA therefore reserves to "[t]he Company" the right to evaluate its employees for layoff, subject only to the art. II grievance procedures. Art. II, § 1 of the CBA, defines a "grievance" as "any dispute involving the proper application or interpretation of this Agreement, or a claim that an employee has been unreasonably and unjustly discriminated against." *Id.*[10] Thus, as the Fifth Circuit

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[10] In addition, the "Purpose" section of the CBA provides that "there shall be no discrimination by the Company, Union, or any other employee because of race, color, religion, sex, or national origin." *Id.* Furthermore, the CBA restricted the arbitrator's authority through an exclusive rule-making clause (art. III, § 5), which provides that

> [t]he Company shall have the exclusive right to determine its operating policies and manage its business in the light of experience, business judgment and changing conditions consistent with the terms and conditions of this Agreement. The Company shall retain all right, power and authority not specifically relinquished in this Agreement.

concluded, this CBA limits an employee's right to contest his selection for termination in a RIF to one or both of two contentions: (1) that the system used to evaluate an employee's capabilities was "inconsistent with the terms of the Agreement or . . . [was] an improper application of the Agreement," or (2) that the Company discriminated against him "because of race, color, religion, sex, or national origin in the evaluation process." *Id.*

In this case, the arbitrator's award reveals that his decision was not based on either of these permissible bases for a grievance. With regard to the first consideration, the arbitrator concluded "that the procedures utilized by the company were, on their face, reasonably calculated to fairly accomplish the determination of 'ability, skill and qualifications' consistent with the requirements of the Contract." (Union's Pet., App. 3, at 12.) With regard to the second consideration under art. II, the Fifth Circuit correctly noted that "the Union has not raised a claim of discrimination. Nor has the arbitrator discussed discrimination in his findings." 71 F.3d at 184. Because the arbitrator's decision was not based on either of the two permissible considerations, the finding of wrongful

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71 F.3d at 182. Also, the CBA contains a "zipper" clause (art. II, § 4) that prohibits an arbitrator from modifying the contract:

> The sole function of the arbitrators shall be to determine whether the Company or the Union is correct with reference to the proper application and interpretation of this Agreement and the arbitrators shall not have any authority to change, amend, modify, supplement or otherwise alter in any respect whatsoever this Agreement, or any part thereof.

Id. Thus, by rejecting the CBA's clear limits on his authority, the arbitrator impermissibly attempted to amend the CBA, requiring vacatur of his award.

termination constituted an ultra vires act, which the Fifth Circuit properly vacated.

Many courts have held that, when an arbitrator's award encroaches upon authority vested solely in one of the parties, vacatur of the award constitutes the proper remedy. *See, e.g., Delta Queen Steamboat*, 889 F.2d at 604; *Bruno's, Inc.*, 858 F.2d at 1532; *S. D. Warren Co. v. United Paperworkers' Int'l Union*, Local 1069, 845 F.2d 3, 5 (1st Cir.), *cert. denied*, 488 U.S. 992 (1988). For example, in *Bruno's* the union challenged a disciplinary rule imposed by the company. 858 F.2d at 1530-31. The arbitrator found that the rule was unfair and void, and he outlined a new policy to take its place. *Id.* In the company's suit to vacate the arbitrator's award, the court held that:

> The agreement between the Union and Bruno's provides that "the right to establish and maintain reasonable rules and regulations covering the operation of the stores is vested in the Employer" . . . **This clause bars anyone other than Bruno's, including an arbitrator, from setting up store rules and operating procedures. The clause constrains both Bruno's and the arbitrator.** Bruno's may not impose an unfair rule, and the **arbitrator may not create a new rule to replace one he strikes down as unreasonable.** Although we are mindful of the great latitude to be given to an arbitrator's interpretation of a collective bargaining agreement, **the portion of the arbitrator's award that writes and imposes a new bascart policy on Bruno's in direct conflict with the express terms of the collective**

> **bargaining agreement was properly vacated.**

Id. at 1532 (emphasis supplied).

The reasoning of the *Bruno's* court applies with equal force in the present case. The CBA provides in art. IV, § 7 that the Company shall determine the employees' abilities, skills, and qualifications, subject to an employee's right to assert a grievance. 71 F.3d at 182, 184. This clause prohibited anyone except the Company, including the arbitrator, from evaluating an employee's skills. Accordingly, on the basis of this bald expropriation of power, the Fifth Circuit correctly set aside the award. *Id.*[11]

The Union correctly points out that "[a]ll that the Arbitrator did was consider the employee's contest of the

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[11] *See also Container Prods.*, 873 F.2d at 820 ("Because just cause for dismissal was found to exist, the arbitrator had no jurisdiction to assess an alternative remedy or impose a modification."); *S.D. Warren Co.*, 845 F.2d at 8 (holding that the arbitrator's substitution of the company's decision to discharge an employee with his decision to suspend the employee was a proscribed modification of the agreement); *Riceland Foods, Inc. v. United Bhd. of Carpenters and Joiners of Am., AFL-CIO-CLC, Local 2381*, 737 F.2d 758, 760 (8th Cir. 1984) ("Because the Arbitrator was not authorized to evaluate the propriety of the discipline selected by Riceland, the District Court should have granted summary judgment in favor of Riceland."), *cert. denied*, 471 U.S. 1102 (1985); *Butterkrust Bakeries v. Bakery, Confectionery & Tobacco Workers Int'l Union*, 726 F.2d 698, 700 (11th Cir. 1984) ("The issue submitted here was limited to whether there was just cause for Woodard's discharge. Therefore, once the arbitrator made a finding on this issue, his authority came to an end."); *Southern Council of Indus. Workers v. Bruce Hardwood Floors*, 784 F. Supp. 1345, 1349 (M.D. Tenn. 1992) ("An arbitrator cannot add his or her own procedural prerequisites under the guise of 'fundamental fairness' absent contractual authorization in the collective bargaining agreement.").

Company's determination of his 'ability, skill and qualifications', and conclude that the employee was right and the Company wrong." (Union's Pet. at 20-21.) However, this inquiry was outside the scope of the arbitrator's authority. As the Fifth Circuit concluded, "[n]othing in the Article II, Section 1 definition of 'a grievance' can be rationally interpreted to include the concept that a grievance includes a claim that an employee has been unfairly or incorrectly evaluated for lay off." 71 F.3d at 184.

If, as the Union claims, the CBA allowed employees to bring the Company's evaluations to an arbitrator for de novo review, the bargained-for language of the CBA giving the Company the right to evaluate employees for layoff would be superfluous. No layoffs can occur under the contract without an evaluation of the employees' relative abilities, skills, and qualifications. Because the decision to conduct a RIF rests with the business judgment of the Company, the Company would have the burden of performing the evaluations under any rational reading of the contract. In the absence of CBA language reserving to the Company the right to evaluate employees for layoff, an employee would presumably be able to assert a grievance merely over any disagreement with the Company's rating. That is the situation that the Union seeks to impose in the instant case even though the Company bargained for the CBA term giving it the right to assess employees' qualifications for layoff.

Fortunately, this is not the law. Rather, unless a CBA states that "all disputes between employers and employees" are arbitrable, "[t]his solution cannot be imposed in blanket fashion, however, so long as arbitration is consensual and the function of the court is to enforce a voluntary undertaking." Cox, 72 Harv. L. Rev. at 1507. Since the CBA circumscribed the arbitrator's authority in the

instant case, the arbitrator's usurpation of authority was undoubtedly subject to judicial review.

The Union also argues that the Fifth Circuit impermissibly infringed on the arbitrator's authority by "indulg[ing] in a fundamental interpretation of the Contract" under "the guise of determining the contractual authority of the Arbitrator."(Union's Pet. at 18.) As explained above, a court's ability to interpret a collective bargaining agreement's terms in order to determine and enforce the contractual limits of an arbitrator's authority is well-settled. *See Communications Workers*, 475 U.S. at 649; *John Wiley & Sons*, 376 U.S. at 346-47. To the extent the Union argues that the Fifth Circuit actually reviewed the merits of the arbitrator's award, this claim lacks merit. Nothing in the Fifth Circuit's opinion alters the substantive findings made by the arbitrator. The opinion does not comment on the questions of the contractual legitimacy of the evaluation procedure or the accuracy of the grievant's evaluation. Nor does the Fifth Circuit reach a conclusion regarding the possible outcome of a claim of discrimination. 71 F.3d at 184. The opinion clearly states that "[t]he sole issue before this Court is whether the arbitrator exceeded his authority under the collective bargaining agreement when he re-evaluated Thornal's qualifications and re-calculated his performance rating." *Id.* The only aspect of the award that the Fifth Circuit reviewed was the arbitrator's re-evaluation of the grievant-- an arbitrability issue clearly within the scope of the court's duty to enforce the limits on the arbitrator's authority.

D. The Arbitrator's Re-Evaluation of the Grievant on the Basis of Extra-Contractual Authority Fails to Draw its Essence from the Terms of the Agreement.

Alternatively, the arbitrator's violation of the "essence" test stems from his reliance on sources completely foreign to the CBA as the basis for his authority to reassess Thornal's skills. In particular, the arbitrator ignored the plain language of the CBA and instead applied the terms of wholly unrelated "Master Labor Agreement[s]" from the "federal public sector." 71 F.3d at 184; Union's Pet., App. 3, at 24-25. It is undisputed that neither the Company nor the Union agreed to abide by the terms of these other collective bargaining agreements. The arbitrator's explicit reliance on these foreign agreements serves as powerful evidence that the award violates the "essence" test. Moreover, although the differences between public and private employers and their unions are patent, pointing out these disparities amounts to an exercise in clairvoyance in this case since the terms of the collective bargaining agreements to which the arbitrator was referring (and on which he was apparently relying) are nowhere to be found in the record. By foisting his idiosyncratic brand of industrial justice upon the parties through his reliance on agreements wholly unrelated to the CBA at issue, the arbitrator betrayed his obligation to confine his role to interpretation and application of the CBA at hand. *Enterprise Wheel*, 363 U.S. at 597.

The applicable law holds that where an arbitrator fails to discuss a probative contract term and at the same time offers no clear basis for how he construed the contract to reach his decision without such consideration, an inference arises that the award was not based on the contract. *George A. Hormel & Co. v. United Food & Commercial*

Workers, Local 9, 879 F.2d 347, 351 (8th Cir. 1989); *see also Harry Hoffman Printing, Inc. v. Graphic Communications Int'l Union Local 261*, 950 F.2d 95, 98 (2d Cir. 1991) ("Where it is clear that the arbitrator *must* have based his award on some body of thought, or feeling, or policy, or law that is outside the contract (and not incorporated in it by reference), the arbitral award cannot stand.") (emphasis in original, quotation marks omitted). For instance, in a case where the arbitrator referred to an entirely separate labor agreement, "ignored relevant provisions of the National Agreement and the law of the shop, altered the issue for decision, and ruled for the Union based on 'the prevailing theory,' . . . [the arbitrator] was dispensing his own brand of industrial justice." *Trailways Lines, Inc. v. Trailways, Inc.*, 807 F.2d 1416, 1424 (8th Cir. 1986); *see also Harry Hoffman Printing*, 950 F.2d at 100 (vacating award because of reliance on unbargained-for due process right and stating that "uphold[ing] an arbitral decision that is predicated explicitly and exclusively on non-contractual concepts and that effectively imposes a condition not bargained-for by the parties would render the limiting sections of the CBA superfluous"). Similarly, in the instant case, the arbitrator ignored the relevant provisions of the CBA at issue and applied a totally different CBA, justifying vacatur by the Fifth Circuit.

An arbitration award is ripe for vacatur where "the arbitrator cannot be said to be 'even arguably construing or applying the contract [or] acting within the scope of his authority.'" *Georgia-Pacific Corp.*, 864 F.2d at 945 (quoting *Misco*, 484 U.S. at 36). The Union's assertion that the arbitrator was "applying the contract" when he concluded that he had the authority to sustain the grievance based on his conclusion that the Company's evaluation of Thornal was wrong is patently incorrect. (Union's Pet. at 21.) The award does not contain a single reference to art. II

of the CBA. As stated above, art. II creates the grievance and arbitration procedure that is the basis of arbitral authority, and it contains a "no alteration" clause, art. II, § 4. 71 F.3d at 182. Because the arbitrator did not even mention these limiting provisions, his award was not even plausibly a construction of the CBA. Other than a recitation of two contract provisions found in a preface to the award, references to the CBA that the arbitrator was supposed to be interpreting and applying were extremely rare.[12]

The arbitrator's breach of duty closely resembles the award at issue in *Harry Hoffman Printing*. There, the arbitrator sustained the grievances of employees who had been replaced while on strike. 950 F.2d at 97. Despite his finding that the employees engaged in unprotected activity that violated the agreement, the arbitrator concluded that their replacement was unjust because "elementary due process" required the company to provide the employees with notice of the legal consequences of their failure to report to work. *Id.* The court noted that even though some sections of the collective bargaining agreement could arguably provide some support for a notice requirement, the fact that these sections were totally ignored by the arbitrator required them to conclude that the basis for the arbitrator's decision was drawn "entirely from improper, extra-contractual sources, rather than from the CBA." *Id.* at 99.

In this case, the relevant portions of the CBA, which were ignored by the arbitrator, do not provide an arguable basis for the aggrandizement of his authority. The arbitrator refused to abide by the bargained-for limitations on his authority and chose instead to conjure up authority for his

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[12]Aside from the two contract provisions set out in the preface, the award mentions terms of the CBA only six times. (Union's Pet. App. 3.)

excursion by reference to his experience in arbitrations in the "federal public sector." 71 F.3d at 184. Clearly, the award was not based on explicit or properly implied terms, but rather was impermissibly based upon the arbitrator's particular notions of industrial justice. *Id.* (citing *St. Louis Theatrical Co. v. St. Louis Theatrical Bhd. Local 6*, 715 F.2d 405, 409 (8th Cir. 1983).

CONCLUSION

The Union argues that the Fifth Circuit exceeded its own authority by analyzing the CBA in determining whether the arbitrator exceeded his authority. However, under the decisions of this Court, "whether or not the Company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties." *John Wiley & Sons*, 376 U.S. at 547.

Next, the Union argues that the Fifth Circuit's enforcement of the CBA's limits on the arbitrator's authority was actually a pretext for its review of the arbitrator's findings on the merits. This allegation lacks any basis in fact. The Fifth Circuit's decision does not discuss the merits of the Union's claim that the Company's evaluation procedure violated the contract or opine as to what types of procedures are allowed under the contract. Nor does the opinion include a discussion of the possibility of the grievant making a successful discrimination claim, or even the accuracy of the arbitrator's re-evaluation of the grievant's abilities. The Fifth Circuit's decision rests on its conclusion that, under the express terms of the contract, the arbitrator lacked the authority to second-guess the Company's evaluation of Thornal's capabilities and perform his own re-evaluation.

Finally, the Union argues that the arbitrator's decision to re-evaluate Thornal's abilities is tantamount to the arbitrator's interpretation of the CBA's limits on his authority and can be reversed only if a court finds that the interpretation fails to draw its essence from the terms of the agreement. As stated above, the question of whether or not the parties agreed to arbitrate certain issues is a determination for the courts, which is to be made based on the terms of the agreement. However, even if one were to apply this deferential standard, the arbitrator's award shows that the basis for his decision to re-evaluate the grievant is found in the terms of a "Master Labor Agreement" used in the "federal public sector." Therefore, even with regard to the arbitrator's view of the scope of his authority, the decision fails to draw its essence from the terms of the agreement.

Because the Fifth Circuit's opinion faithfully adheres to the Supreme Court's prior holdings and because the Fifth Circuit correctly applied the bargained-for provisions of the CBA that limited the arbitrator's authority in this case, the Union's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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